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Innocence, Negligence, and Common Sense: Tort Liability of Mentally Impaired Persons

Recent case law has dictated changes in the treatment of tort cases involving mentally impaired citizens. This study illuminates the developing exceptions to liability with regard to properly trained professional caregivers.

By William P. Donaldson

> It is not, what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do.[1]
>
> Edmund Burke (1729–1797)
> Philosopher, Political Scientist;
> Member of British Parliament

In the late nineteenth century, some 35 or so years after Wisconsin statehood, Justice Cassoday of the state supreme court wrote the opinion in a rather ordinary fire insurance case that has become a focal point for later discussions of tort liability of the "insane."[2] In *Karow v. Continental Ins.*, Justice Cassoday apparently referred to English common-law tradition and a case already two centuries old at the time that declared that "insane persons" are generally liable for injuries caused by their inability to control or understand the consequences of their actions.[3] In applying that principle, the court declared that "where a loss must be borne by one of two innocent parties, it should be borne by him who occasioned it."[4] This decision, as subsequently modified, forms the root of the issue decided by the case that is the topic of this article.

To generalize, the issue discussed here is whether or not a person under a mental disability who is receiving professional services from a health care provider is liable to that provider for injuries that the provider suffers as a result of the recipient's negligent actions. A defining moment in the consideration of this question came with the decision by the Wisconsin Supreme Court in *Gould v. American Family Insurance*.[5] The ruling in that case is limited by the facts to a situation where the interaction between the provider and the patient is one of a strictly professional nature occurring in a controlled environment during the course of prescribed treatment. Consideration is also due the interaction between the civil action brought by the plaintiff caregiver and the worker's compensation laws of the state.

The title of this case frames the issue as primarily one of insurer concern, but the facts and the analysis demonstrate that the outcome of the controversy has much broader implications for persons afflicted with dementia such as Alzheimer's disease.[6] The gentleman who was the original defendant in the suit, Mr. Moniken, had a well-documented history of Alzheimer's and was placed in the particular nursing facility because it had a unit expressly designed to care for residents with this affliction. Mr. Moniken was strategically dropped

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from the litigation before the first trial, and the proceedings were completed with American Family Insurance, the issuer of Mr. Moniken's homeowner's policy as the sole defendant.[7] As later became apparent, American Family had a somewhat different interest in the outcome than did the advocates for patients with dementia who were very much involved in the appeals as *amici curiae.*

The factual history was relatively straightforward. Plaintiff Gould was head nurse of the unit for the nursing facility that was intended and designed to house and care for residents with dementia. She had been an employee (in varying, progressively more responsible positions) of that unit for an extended period of time dating from before she had entered and completed nursing school. At the time of the incident, she was responsible for, among other duties, training and supervision of professional and nonprofessional staff who would provide care to the residents of the unit. She is, by all accounts, a highly competent and qualified nurse who understood the particular difficulties that may be encountered in this type of unit.

On the day of the incident, Nurse Gould found that Mr. Moniken had wandered into another resident's room and she was attempting to redirect him back to his own. Despite her admitted foreknowledge of Mr. Moniken's history of angry outbursts and her understanding of the possibility of physical reaction by Alzheimer's patients, she approached Mr. Moniken with a medication tray in one hand and gently tried to direct him with her free hand on his arm. What exactly happened next is unclear, but it is documented that Nurse Gould was, in some way, struck by Mr. Moniken and severely injured.

Ms. Gould was awarded a worker's compensation settlement as a result of this injury and was, therefore, precluded from pursuing any further claim against her employer.[8] She was not, however, prevented from seeking damages directly from Mr. Moniken and his insurer. Based on the theory of "insane person liability" noted above, she brought this action.

In 1883, *Karow* described the principle of "insane person" liability stating that, where both parties to the incident are "innocent," the person who acted to cause the injury is liable.[9] One might wonder how the actor who causes the injury can be "innocent." The word is used, in this context, not as an opposite of guilt, but in the sense of being unaware of the circumstances, dangers, or possible outcome of a given situation. The factual basis described in *Karow* shows that, in cases of insanity, the insane party is unaware of the wrongness or the consequences of her or his actions and is, therefore, considered innocent. In that context, the injured party in *Karow* was also "innocent" in that the person was unfamiliar with the actor and had no forewarning of the danger he presented. Thus, there were two innocent parties, one of whom caused substantial injury to the other. The *Karow* court held that where an insane person harmed another, liability would be imposed not on the basis of the actor's breach of any duty, but rather on a fairness principle.

In 1935, the Wisconsin Supreme Court, *In re Meyer's Guardianship,*[10] built on the principle outlined in *Karow* and expanded the concept to include two more considerations. In addition to the idea that the actor should be liable when both parties are innocent, the *Meyer* court held that the imposition of liability would be warranted as a means to encourage families to exert a sufficient amount of control over the insane person to assure the public safety. The imposition of liability would, further, prevent feigned insanity as a means of avoiding responsibility. This decision stated the general rule that is applied today as evidenced in Wisconsin's Civil Jury Instruction #1021.

In the 1970 decision in *Breunig v. American Family Ins. Co.,* the court acknowledged an exception to the general rule for situations where the onset of "insanity" is completely unanticipated and without forewarning.[11] Here, the driver of an automobile suddenly became convinced that a divine entity was controlling her actions (and those of the car) and she was involved in a serious accident. Because there had been no history of mental aberrations that might have foreshadowed this event, the court ruled that the general rule of liability was inapt and that it would not apply where the person is suddenly overcome without forewarning by a mental disability or disorder that incapacitates him from conforming his conduct to the standards of a reasonable man. The court likened the circumstance in *Breunig* to a situation where a driver suffers an unexpected heart attack, stroke, or epileptic seizure.[12]

A somewhat similar case was decided contemporaneously with *Gould.* The court, in *Burch v. American Family Ins. Co.,*[13] found no liability

where an unfortunate fact pattern in which the tortfeasor's father was the caregiver-victim did not fit into the exceptions described in either *Breunig* or *Gould*. In *Burch*, the caregiver left his mentally disabled adolescent daughter in the cab of a truck with the keys in the ignition while he walked behind the vehicle. The child started the engine, and the vehicle lurched backward, injuring the father. Without specifically declaring as much, it appears the court found the father was not "innocent" of the dangers posed by his actions relative to his child's condition. The jury found that the father's negligence was the sole cause of the accident and refused to find liability on her part or of the insurer.

In a case with remarkably similar facts, the Florida Supreme Court held in *Anicet v. Gant* that a caregiver's understanding and experience in dealing with potentially dangerous patients created a buffer to negligence claims made against "insane" patients.[14] In that case, the Florida court held that the differences between the instant facts and the precedential case that formed the basis for that state's rule of "insane person" liability in negligence actions were sufficient to warrant an exception based on public policy.

Often cited, but readily distinguishable from this situation, is the 1935 case of *McGuire v. Almy*.[15] There, the caregiver was injured while on duty as an in-home nurse without special training in mental diseases. Further, the claim made in that case was for an intentional tort of assault and battery. The opinion does not state how the court would have ruled if negligence had been the claim, but the court does conclude that, under these circumstances, the intent of the actor was to strike the victim. She did act on that intent, thus justifying a jury finding of guilt on the claim of intentional assault.

Ms. Gould's case was tried before a St. Croix County Circuit Court jury and decided in September of 1993. Shortly before the trial began, Mr. Moniken was dropped as a defendant in the case, apparently for strategic reasons. The judge gave the case to the jury with a standard instruction as specified in Wisconsin's Civil Jury Instruction #1021. That instruction states that

> it is the law that a person who is mentally ill is held to the same standard of care as one who has normal mentality, and in your determination of the question of negligence, you will give no consideration to the defendant's mental condition.

The jury returned a finding in favor of Ms. Gould and an appeal to the court of appeals was taken.

The court of appeals[16] overturned the trial court's result and surprisingly found a nearly universal exception to liability for insane tortfeasors. In nearly complete opposition to the earlier precedents, the court held that, under *Breunig*, it is "unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident."[17] The court of appeals here reasoned that the *Breunig* decision is incompatible with the rationale and standards of *Meyer* and thus, found that a person with a "permanent mental disorder" cannot be liable in negligence. The decision was satisfactory to neither side, and both parties appealed to the state supreme court.

At the supreme court, Plaintiff Gould argued to reinstate the *Meyer* standards, which would allow a finding of liability against Mr. Moniken's insurer, and Defendant American Family sought to have the trial court's decision overturned according to the principle outlined by the court of appeals without further modification or proceedings.

Gould asserted that a "permanent mental disability" exception is unreasonable as a public policy and not a proper defense to negligence. The plaintiff further claimed that this ruling would lead to windfalls for insurers who could collect premiums from mentally disabled persons and deny claims against them on the basis of that disability. Finally, the plaintiff argued that the protections of worker's compensation were inadequate in this context and were not meant to insulate third-party tortfeasors from liability for accidents that happen on the job.

The defense argued that the principles of the *Breunig* decision are apt and that tort liability requires some degree of fault. The defense also pointed out that new information and understanding of mental illness, and new public concern for the plight of families dealing with loved ones afflicted with Alzheimer's disease and similar conditions, requires a revisiting of the rationale behind the current public policy.

Additionally, there were briefs *amicus curiae* filed by the Board on Aging and Long Term Care

of Wisconsin (BOALTC), the Coalition of Wisconsin Aging Groups (CWAG), and the American Association of Retired Persons (AARP). These briefs raised and detailed several considerations apart from those contained in the briefs of the parties. In a joint brief, BOALTC and CWAG focused their comments on the primary issue of this case's differences from the situation addressed by the *Meyer* ruling. Additionally, BOALTC and CWAG discussed the problem of decreased availability of meaningful insurance for Alzheimer's patients if the court of appeals decision remained intact. AARP, on the other hand, argued for application of a "subjective" standard of care comparing the actor's actions to those of a "reasonable man with a like disability." Reasoning that Alzheimer's is a physical disease, not unlike cardiovascular disease causing stroke or heart attack, AARP sought to have the court adopt a situational determination of responsibility.

At oral argument, the court seemed very interested in defining and determining the role of foreknowledge and experience in the conduct of daily activities of this kind of care unit. As an observer, I had the sense that the court was seeking a way to do, as Mr. Burke suggested, "what humanity, reason, and justice tell [us that we] ought to do."[18]

The supreme court's ruling was handed down on January 30, 1996. In a thoughtfully crafted opinion, Justice Ann Walsh Bradley held that there ought to be a narrowly circumscribed exception to the general rule where an "insane" person negligently harms a paid professional caregiver.

> In sum, we agree with the Goulds that ordinarily a mentally disabled person is responsible for his or her torts. However, we conclude that this rule does not apply in this case because the circumstances totally negate the rationale behind the rule and would place an unreasonable burden on the negligent institutionalized mentally disabled. When a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not "innocent" of the risk involved. By placing a mentally disabled person in an institution or similar restrictive setting, "those interested in the estate" of that person are not likely to be in need of an inducement for greater restraint. It is incredible to assert that a tortfeasor would "simulate or pretend insanity" over a prolonged period of time and even be institutionalized in order to avoid being held liable for damages for some future civil act. Therefore, we hold that a person institutionalized, as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be held liable for injuries caused to caretakers who are employed for financial compensation.[19]

From the perspective of an advocate for the rights of elderly residents of nursing homes, group homes, and other residential care settings, this ruling represents a significant benchmark establishing just treatment of unfortunate incidents involving persons with dementia. It further underscores the importance to caregiving organizations of maintaining effective training and procedures to safeguard the interests of both residents and staff.

Had this ruling reversed the court of appeals decision and returned the case to the original trial court outcome, insurers would have been faced with circumstances strongly suggesting that persons with dementia represent too great a risk to qualify for ordinary insurance. Had the supreme court upheld the court of appeals, insurers would have been effectively insulated from any claims for injuries resulting from the negligence of an "insane person" and yet been allowed to continue collecting premiums for their clients' insurance policies. This case was originally brought as a claim against Mr. Moniken's homeowner's policy. Despite the fact that he was not residing in the home at the time of the event, he was still listed as a primary owner and the insurance was held in his name. Had the trial court's rulling been upheld, it could very easily have had the effect of making it difficult, if not impossible, for persons with dementia to obtain homeowner's insurance. This would then require families to isolate their loved ones, symbolically if not actually, by stripping them of the ownership of the family estate, which the person had, in all likelihood, worked to secure over the course of a lifetime. This indignity would be another added to the many already suffered by Alzheimer's victims. The Appeals Court ruling, if left intact, would have opened a door for insurers to potentially realize a financial windfall by permitting issuance of policies that would not be subject to any claim where the insured's actions were a result of dementia. In crafting this decision, Judge Bradley effectively drew a separation between these unattractive results and created an exception that addresses this unfortunate situa-

tion. The changing epidemiology of dementia makes this issue a potentially much more frequently encountered problem.

Less than a year after the decision in *Gould,* a California appeals court cited the case as informative in its decision in *Herrle v. Marshall.*[20] The facts in *Herrle* are similar to *Gould,* but the defense raised by the defendant is one of "primary assumption of risk."[21] Defining primary assumption of risk as a situation where the defendant does not owe a duty of care to the plaintiff, the California court found the only duty of care was in the other direction from plaintiff to defendant. California has codified the common-law doctrine of "insane person liability,"[22] and the caregiver-plaintiff in *Herrle* relied on that statute as a means to attribute liability to the defendant. The court found, however, that Civil Code Section 41 applies in situations where the "person of unsound mind" has a duty of care. "Where no duty exists, section 41 does not create one."[23] Because of the relationship between the two parties, the court ruled that there was no duty on the part of the patient toward the caregiver. In a lengthy analysis of the Wisconsin decision, the California court found Justice Bradley's reasoning persuasive that the relationship between an "Alzheimer's patient and his employed caretaker justifies exonerating the patient from the usual duty of care."[24]

An Indiana court, in *Creasy v. Rusk,*[25] considered the issues raised by *Gould* and determined that "the public policy implications of imposing a duty [of care] on an institutionalized mentally disabled patient are dependent upon the degree of the patient's incapacity."[26] This would seem to require a fact finder's determination of the "degree of incapacity" in each case, thus setting the stage for a "battle of experts" on the issue.

A very recent Wisconsin case, *Jankee v. Clark County,*[27] finds the court of appeals applying *Gould* in a contributory negligence case rather than in the "insane person liability" context in which it was originally decided. Here, the plaintiff claimed that the injuries that he sustained as a result of attempting to escape from the mental institution in which he was appropriately confined were the result of the facility's negligent supervision of his person. The nursing home, a county facility, countered that Mr. Jankee was contributorily negligent in causing his own injuries by falling from a second story window while trying to escape. Using the public policy analysis set forth in *Gould,* the judges determined that the plaintiff was within the exception outlined in that case.[28] The opinion further concludes that *Gould* "supports a bar to contributory negligence when a person institutionalized with a mental illness or mental disability who does not have the capacity to control or appreciate his or her conduct because of that illness or disability claims that the institution or its employees were negligent."[29]

Gould and the related cases represent an advance in the judicial treatment of mentally disabled citizens. It has long been recognized that loss of mental capacity is not sufficient reason to strip a person of basic rights.[30] The justices in *In re The Matter of Guardianship of L.W.* completed a thorough analysis of the precedents leading to the conclusion that a person in a persistent vegetative state remains possessed of the fundamental right to determine what is done to his body. Is it less of a fundamental right to be free from liability for actions that injure the person who was paid, trained, and responsible to prevent those very same actions by a mentally disabled patient?

Alzheimer's disease and related conditions sap the very essence of the individual. Memories disappear. Frustration and rage are frequently the replacements. In the mind of a formerly calm and loving father or mother, a new and frightening personality may appear. Families, when trying to cope with these changes, are forced at some point to seek professional help in some degree. The prospect that the professional consulted will one day be able to assert a liability claim arising out of the condition they are supposed to alleviate may be enough to cause families to delay seeking treatment. This is not the effect that the law should have. The law should help to protect and preserve the rights of the most vulnerable among us. Nurse Gould was injured, no doubt. She was duly compensated to the extent of the worker's compensation laws. If she had been unprepared for Mr. Moniken's actions, if she were not an expert in the nursing care and treatment of Alzheimer's patients, if she were not employed explicitly for providing such care and treatment, the general rule of "insane person liability" would apply. But, when we apply the law, we must, as Mr. Burke said, apply it with "humanity, reason, and justice" in order to prevent the diminution of our society by the systemic diminution of the rights of the mentally disabled. In creating the professional caregiver exception to the

general rule of insane person liability, the *Gould* court displayed remarkable humanity, reason, and justice.

Endnotes

1. Edmund Burke, *in* THE OXFORD DICTIONARY OF QUOTATIONS (3rd ed. 1980).
2. *See* Karow v. Continental Ins., 15 N.W. 27 (1883).
3. In her discussion of the foundations of the principle, Justice Ann Walsh Bradley, in Gould v. American Family Ins. Co. [198 Wis. 2d 450, 456, 543 N.W.2d 282 (1996)], cites Professors Prosser and Keaton's treatise on torts as identifying the origin in English common law as being *Weaver v. Ward* [80 Eng. Rep. 284 (K.B. 1616)].
4. *See* Karow v. Continental Ins., 15 N.W. 27, 28 (1883).
5. *See* Gould v. American Family Ins. Co., 198 Wis. 2d 450, 543 N.W.2d 282 (1996).
6. *See id.*
7. *See* Gould v. American Family Ins. Co., 187 Wis. 2d 671, 523 N.W.2d 295 (1994).
8. *See* W.S.A., Ch. 102 (Workers' Compensation).
9. *See* Karow v. Continental Ins., 15 N.W. 27, 34 (1883).
10. In re Meyer's Guardianship, 261 N.W. 211 (1935).
11. *See* Breunig v. American Family Ins. Co., 45 Wis. 2d 536, 173 N.W.2d 619 (1970).
12. *See id.* at 544.
13. Burch v. American Family Ins. Co., 198 Wis. 2d 465, 453 N.W.2d 277 (1996).
14. *See* Anicet v. Gant, 580 So. 2d 273 (Fla. App. Dist. 3, 1991).
15. *See generally* McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (S.J.C. Mass., 1937).
16. *See* Gould v. American Family Ins. Co., 187 Wis. 2d 671, 523 N.W.2d 295 (1994).
17. *Id.* at 677.
18. *See* Burke, *supra* note 1.
19. Gould v. American Family Ins. Co., 198 Wis. 2d 450, 543 N.W.2d 282 (1996).
20. Herrle v. Estate of Marshall, 45 Cal. App. 4th 1761, 53 Cal. Rptr. 2d 713 (1996).
21. *Id.* at 1764.
22. *See generally* California Civil Code, § 41 (Persons with Unsound Mind).
23. Herrle v. Estate of Marshall, 45 Cal. App. 4th 1761, 1766, 53 Cal. Rptr. 2d 713, 718 (1996).
24. *Id.* at 1770.
25. Creasy v. Rusk, 696 N.E.2d 442 (1998).
26. *Id.* at 447.
27. Jankee v. Clark County, 1998 WL 652662 (Wis. App., Sept. 24, 1998).
28. *Id.* at 10.
29. *Id.* at 12.
30. *See* In re The Matter of Guardianship of L.W., 167 Wis. 2d 53, 482 N.W.2d 60 (1992).